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Supreme Court, U.S.
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In The

Supreme Court of the United States

October, 1995

DAVID LOCKMILLER,

Petitioner,

v.

SUPERIOR COURT OF SANTA CLARA COUNTY,

Respondent.

To the Court of Appeal of the State of California
Sixth Appellate District

PETITION FOR WRIT OF CERTIORARI

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36 pp

CONSTITUTIONAL QUESTIONS

I. Is it a violation of a citizen's state and federal constitutional due process of law rights for a state court of appeal to refuse to consider "on the merits" a citizen's petition of appeal because the citizen is not represented by legal counsel?

II. Is it a violation of a citizen's state and federal constitutional due process of law rights for a state court of appeal to refuse to apply binding authority case law precedent mandating, under the requisite and appropriately demonstrated factual circumstances, reinstatement of Petitioner's state due process of law rights?

III. Given the fact that "[i]t is as much the duty of government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals," (President Abraham Lincoln, Annual Address to Congress, December 3, 1861), is it violation of a citizen's state and federal constitutional due process of law rights and the citizen's state constitutional petition for redress of grievances right for a state court of last resort, on a Petition for Review of the Court of Appeal order, to not overturn for reason of abuse of judicial discretion the legally erroneous court of appeal order, and thereby restore Petitioner-Plaintiff's due process right of access to the courts?

LIST OF ALL PARTIES TO PROCEEDING
IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

1. Dennis Del Ponte, defendant

2. Law office of Zingheim, Vernon & Del Ponte, defendant

3. Noel Gassett, attorney of record

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CONSTITUTIONAL PROVISION CONFERRING JURISDICTION TO REVIEW ON A WRIT OF CERTIORARI THE ORDER OF THE CALIFORNIA SUPREME COURT

To the Honorable Chief Justice of the United States Supreme Court and the Associate Justices of the United States Supreme Court:

David Lockmiller, appellant and petitioner, respectfully petitions for writ of certiorari following the decision of the Court of Appeal, Sixth Appellate District, filed on January 16, 1996, and the decision of the California Supreme Court, filed on March 20, 1996.

Petitioner-Plaintiff seeks review by the United States Supreme Court of the California Supreme Court order on the basis of citizen protection granted by the 14th Amendment to the United States Constitution. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S. CONST. amend. XIV, §1.) The corresponding California State Constitutional provision reads as follows: "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . . ." (Calif. Const. Art. 1, §7(a))

The basis of this petition relies on the following two federal case law precedents legally defining the meaning of this U. S. Constitutional provision. 1) "The right of appeal from such a [merely erroneous] judgment is no part of due process. [But] [t]he right of a litigant to a trial in accordance with the forms of law, and with an opportunity to present his claim or defense, if he desires to do so, is a vital part of due process." Ackermann v. U. S. (Tex. 1950) 178 F.2d 983, 985, affirmed 71 S.Ct. 209, 340 U.S. 193, 95 L.Ed. 207, followed in 179 F.2d 236, certiorari granted 70 S.Ct. 996, 997, 339 U.S. 962, 94 L.Ed. 1371 (alterations in original). 2) "The Fourteenth Amendment confers the right to a fair opportunity to present a claim . . . [that] has 'a reasonable basis in fact or law' . . .; therefore, they are entitled to judicial access that is 'adequate, effective, and meaningful.'" Bell v. City of Milwaukee, (Wis. 1984) 746 F.2d 1205, 1263 (alterations in original) (citations omitted).

This Petition for Writ of Certiorari has not been prepared, or assisted therein, by an attorney authorized by this United States Supreme Court to submit such a petition and petitioner does not qualify to file in forma pauperis. Petitioner did not even attempt to retain the services of an attorney. After a year of supremely diligent efforts to retain an appellate attorney to present his Petition for Writ of Error Coram Vobis to the California Appellate Court, all the efforts proved fruitless. Because of this prior experience, Petitioner did not even attempt to retain the services of a federal appellate law attorney.

In the alternative form, Petitioner asks this United States Supreme Court to consider this petition under provisions of the All Writs Act, 28 U.S.C.A. § 1651(a). The All Writs Act authorizes the Supreme Court and all courts established by act of Congress to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

PETITION FOR WRIT OF CERTIORARI

In a Petition of Review to the California Supreme Court, Petitioner-Plaintiff argued that the Appellate Court of the Sixth Judicial District abused its judicial discretion by ignoring and not applying established judicial policy and precedent that the "equitable considerations of fair hearing and penalizing fraud [are] compelling" when it has been factually established that fraud upon the trial court by a litigation opponent has prevented the trial of a claim. Los Angeles Airways v. Hughes Tool Co. (1979) 95 Cal.App.3d 1, 7; 156 Cal.Rptr. 805. In petition to the Sixth Appellate Court, Petitioner-Plaintiff cited three precedent cases of the Sixth Appellate Court itself which had cited this case in their own well-reasoned opinions as to whether to grant or deny a petition for Writ of Error Coram Vobis. These binding authority opinions and the demonstrated fact of fraud were ignored by the Sixth Appellate Court. The Petition for Writ of Error Coram Vobis was denied without explanation.
Petitioner-Plaintiff argued to the California Supreme Court that he had been denied by the Court of Appeal a fair opportunity to present a claim that had reasonable basis in both fact and law. Petition for Review of the Court of

Appeal order was denied subsequently by the California Supreme Court, again without explanation.

Petitioner-Plaintiff argues to this United States Supreme Court that neither petition could have been denied on the merits and therefore both petitions were denied either because Petitioner-Plaintiff was not represented by legal counsel or because he did not meet the requisite technical standards for presentation of his respective petitions of appeal. In fact, this was the argument made to the California Supreme Court.

"This case presents the following issues for review:

1) Article I, § 3 of the California State Constitution reads as follows: "The people have the right to . . . petition government for redress of grievances . . . ." "There is no constitutional right to appointment of counsel for the plaintiff or defendant in a civil proceeding, no matter what the nature of the case or the poverty of the party." Witkin California Procedure, "Attorneys," (1985) P. 77. Is it not a violation of Article I, § 3 of the California State Constitution for a Court of Appeal to hold a non-attorney citizen petitioner to the same technical standard of petition presentation as that of a licensed attorney specializing in appellate law?

2) "When writ review is the exclusive means of appellate review of a final order or judgment, an appellate court may not deny an apparently meritorious writ petition, timely presented in a formally and procedurally **sufficient** manner

. . . ." (emphasis added) Powers v. City of Richmond (May, 1995) 10 Cal. 4th 85, 114. When writ review is the exclusive means of appellate review of a final order or judgment, is it not abuse of judicial discretion for a Court of Appeal to reject a non-attorney citizen petition because it does not meet the same technical standard of petition presentation as that of one prepared by a licensed attorney specializing in appellate law?" (Petition for Review to California Supreme Court P. 8.)

The following "STATEMENT OF THE CASE" was made to the California Supreme Court as part of the "PETITION FOR REVIEW:"

"In February, 1988, Petitioner filed a legal malpractice complaint in the Superior Court for Santa Clara County. In October, 1988, Petitioner moved from the address provided in the original complaint and did not notify the court or the opposition party of the change in address. In April, 1991, legal counsel for Attorney-Defendant filed a "noticed" Motion for Discretionary Dismissal of Petitioner-Plaintiff's meritorious claim. Petitioner did not receive notice of the pending hearing and therefore did not attend.

In the uncontested hearing, Attorney-Defendant and his legal counsel, by fraudulent means, convinced the law and motion judge for the trial court to grant the specious motion. Attorney-Defendant's sworn bad faith denial of the existence of the contract for legal services regarding the "book manuscript" to be evaluated on Petitioner's behalf and the deliberate, knowing concealment from the court by Attorney-

Defendant's legal counsel of the relevant, substantial facts regarding Petitioner's pursuit of this lawsuit since it was filed were the means whereby these attorneys were able to convince the law and motion judge to grant the motion.

Following the non-adversary hearing of June 20, 1991 on the motion, Judge Reed Ambler, acting as law and motion judge for the trial court, signed the order of involuntary dismissal of Petitioner-Plaintiff's meritorious causes of action on the basis of "proof having been [sic] to the satisfaction of the court and good cause existing therefore." (trial court order of involuntary dismissal)

In his Petition for Writ of Error Coram Vobis, petitioner challenged that proof, consisting of attorney-defendant's sworn declaration of facts and his legal counsel's Memorandum of Points and Authorities in Support of the Motion for Discretionary Dismissal, as constituting fraud upon respondent court and absent Petitioner-Plaintiff. Fraud that has prevented the defrauded party from getting into court at all is extrinsic to the proceeding and is a basis for relief.

> [F]raud that prevented the trial of a claim or prevented the defrauded party from getting into court at all is extrinsic to the proceeding and is a basis for relief. Where there has been little or no judicial time invested in trial of a cause or an issue, the factor of judicial economy which otherwise weighs in favor of finality is less strong, and **the equitable**

considerations of fair hearing and penalizing fraud weigh more compelling. (emphasis added) Los Angeles Airways, Inc. v. Hughes Tool Co. (1979) 95 C.A. 3d 1, 156 Cal. Rptr. 805."

This case presented precisely the appropriate circumstances for the issuance of extraordinary relief and accordingly the writ of error coram vobis should have been issued by the Sixth District Court of Appeal. Ample credible evidence of the two instances of attorney perpetrated fraud upon respondent court was presented to the Six District Court of Appeal. The order from the Court of Appeal reads as follows: "The petition for writ of mandate is denied." It is unclear from the Court of Appeal written ruling, by reason of silence on the issue, whether the Petition was denied summarily on the merits or because the petition was not presented in a formally and procedurally sufficient manner." (Petition for Review P. 9 -11.)

Petitioner-Plaintiff made the following state constitutional argument to the California Supreme Court:

"Despite supremely diligent efforts to retain legal counsel specializing in appellate law to conform the petition to the rules of the court of appeal, Petitioner was unable to do so. To the Court of Appeal, Petitioner submitted a separate exhibit detailing his unsuccessful and perhaps futile efforts to retain competent legal counsel for the purpose of conforming his petition to the presentation rules of the Court of Appeal. For this petition to the California Supreme

Court, Petitioner has lodged letters he has written in the last year to the three appellate attorneys and the written response which was received from two of them.

Given the fact that there is no constitutional right to legal counsel in civil matters (Witkin California Procedure, "Attorneys" at 77), given the fact that every citizen has the right to petition the government for redress of grievances (California State Constitution Article I, § 3), and given the fact that some citizens with meritorious petitions may either be too poor or unable to persuade an attorney to conform the presentation of facts and issues of law in accordance with the California Rules of Court, should not there be some relaxation of the courts' rules of technical presentation so that these worthy citizens may be able to exercise effectively their constitutional right to petition the judicial branch of government?" (Petition for Review P. 11 -12)

"Clearly, every citizen's constitutional right to petition the government for redress of grievances must be placed on a different judicial plane, and deserves much the higher consideration, than that of court rules of administration intended to make the work of the judiciary more efficient. There must be judicial recognition and appropriate allowance for the difficulties a non-attorney petitioner faces in meeting the technical standards of petition presentation; the alternative is to permit the procedural rules of the courts to be used effectively and unconstitutionally to keep non-attorney petitioners with legitimate grievances out of the courts. Minor infractions of court administrative rules of petition presentation which may be easily remedied, or even

overlooked, and not culpably prejudicial to the other parties should not be considered as adequate basis for a Court of Appeal not to consider the citizen's petition on the merits. It may be in the interests of an overburdened court system to do so, but it is not in the interests of justice.

As to the second issue raised by Petitioner, the California Supreme Court in Brill v. Fox (1931) 211 Cal.739, 743, 297 P. 25 settled this issue which was before the Sixth District Court of Appeal in the present case a very long time ago:

> "The legal principles underlying the granting of motions to set aside defaults are comparatively simple, and have been frequently announced by this court. The question is primarily one within the discretion of the trial court, but this discretion is not capricious or arbitrary, but is an impartial discretion guided and controlled in exercise by fixed legal principles.
>
> 'It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.' (citations omitted) It is also well settled that **it is the policy of the law to bring about a trial on the merits wherever possible, so that any doubts which may exist should be**

> **resolved in favor of the application, to the end of securing a trial upon the merits.** (citations omitted) Although it is true that the courts of appeal have shown great reluctance in cases of this kind to disturb the order of the trial court, it is equally true that denials of such relief by the trial court are scanned more carefully than cases where the trial court has granted the relief, to the end that wherever possible cases may be heard on their merits. (citations omitted) (emphasis added)"
> (Petition for Review P. 13 - 15)

In the instant case, Petitioner-Plaintiff has alleged and proven in petition to the state's appellate judiciary that his state and federal constitutional rights to due process of law in a legal malpractice lawsuit were terminated involuntarily and prematurely as an immediate, direct result of fraud perpetrated upon the law and motion judge for the trial court by Attorney-Defendant. In Plaintiff-Petitioner's absence, the meritorious legal malpractice lawsuit was dismissed by order of the court on the basis of fraud perpetrated upon the law and motion judge. Following discovery that his due process of law rights had been terminated illegally in such a manner, a subsequent civil appeal, by means of extraordinary writ, had to be made to reinstate Plaintiff-Petitioner's due process right of access to the courts.

Petitioner-Plaintiff contends to this United States Supreme Court that both his Petition for Writ of Error

Coram Vobis to California's Sixth District Court of Appeal and his Petition for Review to the California Supreme Court were denied, not on the merits, but rather because Petitioner-Plaintiff was not represented by legal counsel. Although it may be in the interests of a time-pressed state court system to keep petitioners not represented by attorneys out of the courts of appeal in this manner, it is not necessarily in the interests of justice and fair play. It is also a violation of Petitioner-Plaintiff's state and federal constitution rights to due process of law and state constitutional right to petition the government for redress of grievances.

In General Dynamics Corp. v. Superior Court, (1994) 7 Cal.4th 1161, 1181; 32 Cal.Rptr.2d 1; 876 P.2d 487 the unanimous California Supreme Court declared that "an attorney's highest duty is to the welfare and interest of the client." Petitioner-Plaintiff presented in petition form to the Sixth District Court of Appeal prima facie evidence of three separate and distinct frauds perpetrated upon his client, Petitioner-Plaintiff, by Attorney-Defendant. The successive attorney frauds first foreclosed Plaintiff-Petitioner's causes of action against his former employer and then foreclosed his right to pursue the only avenue to justice remaining to him, i.e. a legal malpractice lawsuit.

It is unimaginable and incomprehensible to Petitioner-Plaintiff as to what judicial doctrine or policy, constitutional provision, legislated statute, case law precedent or administrative rule of the court, either the state court of appeal or state Supreme Court considered to be more

important than punishing these ethics violations of an attorney upon his client. Petitioner-Plaintiff has been left in dumbfounded wonderment as to what the California Supreme Court and the Sixth District Court of Appeal might consider to be a serious violation of an "attorney's highest duty."

Both state courts of appeal failed to give any reason for denial of Petitioner's respective petitions. The Sixth District Court of Appeal stated in entirety: "The petition for writ of mandate is denied." The California Supreme stated in entirety: "Petition for review DENIED."

In the third and final fraud perpetrated by Attorney-Defendant upon his client, Petitioner-Plaintiff, the law and motion judge for the trial court gained ersatz standing as the object of the intent to defraud or induce reliance.

> "The elements of fraud which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, §676, p. 778; see also Civ. Code § 1709." Andrew Lazar v. The Superior Court of Los Angeles County (January 29, 1996) 12 Cal.4th 631, 638.

Plaintiff-Petitioner had written a book manuscript about being falsely accused of sexual harassment by an employee whom he supervised and included, in chronological order, the events that led up to the false allegations, the company's investigation into these false allegations and the results thereof, Plaintiff-Petitioner's initial legal consultation with Attorney-Defendant, Plaintiff-Petitioner's subsequent forced resignation and his internal administrative appeal therefrom without the benefit of legal counsel, and Plaintiff-Petitioner's futile and fruitless efforts for a year thereafter to gain employment.

Plaintiff-Petitioner retained Attorney-Defendant to do a legal evaluation of the book manuscript in order to determine if any of Plaintiff-Petitioner's legal rights had been violated. As a result of the law and motion judge's reliance upon the sworn testimony of Attorney-Defendant that there had never been a contract for legal services between the litigating parties, Petitioner-Plaintiff's meritorious legal malpractice lawsuit was dismissed involuntarily by order of the trial court.

Moreover, the law and motion judge for the trial court was made an unwitting accomplice to fraud in a civil judicial proceeding. Attorney-Defendant had willfully failed to perform legal services for his client, Plaintiff-Petitioner, and then willfully deceived the court. Although no damage attached to the unwitting judge, Petitioner-Plaintiff's state and federal constitutional guarantees to due process of law were immediately terminated by order of the court.

In an attempt to invoke the equitable powers of both state courts of appeal, Petitioner included a lengthy citation from a California Supreme Court opinion that was directly on point:

> "In the past we have recognized that the filing of false or misleading pleadings or documents is ground for discipline. In Pickering v. State Bar (1944) 24 Cal. 2d 141, 144, [148 P.2d 1], we held that 'The presentation to a court of a fact known to be false presumes an intent to secure a determination based upon it and is a clear violation of [§ 6068] (See also Olquin v. State Bar (1980) 28 Cal.3d 195, 199-200 [167 Cal.Rptr. 876, 616 P.2d 858]) . . . ."
>
> "Petitioner urges that his misrepresentation does not warrant discipline because it was unlikely to mislead the court or injure [Plaintiff]. This contention lacks merit. Actual deception is not necessary to prove wilful deception of a court; it is sufficient that the attorney knowingly presents a false statement which tends to mislead the court. (Pickering v. State Bar, supra, 24 Cal.2d at pp. 144-145.) Moreover, petitioner's false statement, **IF BELIEVED**, would have had a substantial effect upon [Plaintiff], whose [damages] were at stake."

> **"The willful failure to perform legal services for which an attorney has been retained** (Finch v. State Bar (1981) 28 Cal.3d 659,665 [170 Cal. Rptr. 629, 621 P.2d 253]) **and the willful deceiving of a court** (Pickering v. State Bar, supra, 24 Cal. 2d at pp. 144-145) **each warrant a separate and independent disciplinary response. When both offenses are committed in concert, substantial discipline is warranted."** Davis v. State Bar (1983) 33 Cal. 3d 231,240; 655 P.2d 1276 (emphasis added).

Unfortunately, for Petitioner-Plaintiff in the present case, the law and motion judge for the trial court **DID BELIEVE** Attorney-Defendant's perjured representation that Petitioner-Plaintiff was never his client." (Petition for Review P. 26 -27)

On the issue of comparative credibility, Petitioner-Plaintiff wrote the following to both the Court of Appeal and the California Supreme Court:

"In summary for this court on the issue of credibility, either Petitioner-Plaintiff now is committing perjury in his sworn verification accompanying this Petition for Writ of Error Coram Vobis or Attorney-Defendant committed perjury in his sworn statement accompanying the successful motion for involuntary dismissal of this case in 1991. Is Petitioner-Plaintiff now perpetrating this massive, complex fraud upon this Court of Appeal and Attorney-Defendant

with the purpose and intent of obtaining illegal financial gain by means of an "unmeritorious" malpractice lawsuit? Or, did Attorney-Defendant willfully and intentionally conceal from the court in 1991 the truth as to the existence of the contract for legal services between the litigating parties in an effort to escape any and all liability for his legal malpractice? The truth or falsity of the conflicting evidence must be determined by this Court of Appeal in deciding the issue.

At the time of the uncontested hearing on the motion to dismiss involuntarily this case in 1991, the law and motion judge for the trial court accepted as being true the uncontested, perjured testimony of attorney-defendant. According to the public record of this case, even though Attorney-Defendant's sworn statement conflicted wholly with the allegations made in the malpractice complaint and was in substantial variance with his own legal counsel's original answer to the complaint, the law and motion judge did not ask a single question at the uncontested hearing on the motion in 1991. The law and motion judge did not question Attorney-Defendant regarding either the nature of the materials read or the nature and substance of the subsequent comments admittedly made by Attorney-Defendant to Plaintiff-Petitioner in exchange for the $300.

The conflict of evidence in this case logically leads to the one critical question: Why would Plaintiff-Petitioner pay Attorney-Defendant $300 to hear Attorney-Defendant's comments of a strictly "non-legal" (i.e."he was never my client") nature regarding Plaintiff-Petitioner's book

manuscript? If an author has to pay each reader $300 to read his book, it would not be a profitable enterprise.

And this Court of Appeal might also question why Attorney-Defendant and his legal counsel waited? Why did they wait until the uncontested hearing on their motion for involuntary dismissal of Plaintiff's malpractice lawsuit before claiming "He (Plaintiff) was never my client." Why was this "true" fact not the answer made by Attorney-Defendant's legal counsel to the original legal malpractice complaint? Wouldn't it have been better to end this "unmeritorious" legal malpractice lawsuit sooner rather than later?

The truth is that the law and motion judge, and therefore the respondent court, was cheated out of the truth by Attorney-Defendant and his legal counsel in 1991 regarding the contractual relationship between the litigating parties and Plaintiff-Petitioner's efforts to pursue this lawsuit since it was filed. On the basis of false, misleading, and perjured testimony, the law and motion judge granted the motion of involuntary case dismissal of Plaintiff's case. These frauds perpetrated upon the court and absent plaintiff has deprived Plaintiff-Petitioner of an opportunity to litigate his case and therefore constitutes extrinsic fraud meriting the equitable relief of this court and the imposition of appropriate and severe judicial sanctions upon the offending attorneys.

Attorney-Defendant's sworn bad faith denial of the contract to perform legal services is itself an additional cause of legal action. "A contracting party should not be able to

deny the existence of a valid contract in order to shield itself from liability for breach of that contract. **Today, the court holds that an action will lie in tort against such conduct.**" Chief Justice of the California Supreme Court Rose Bird separate, concurring opinion in Seaman's Direct Buying Service, Inc. v. Standard Oil Co. (1984) 36 Cal.3d 752, 774-775, 206 Cal.Rptr. 354, 686 P.2d 1158." (Petition for Review P. 27 - 30.)

As to the level of evidence necessary to sustain, within legal discretion, a meritorious petition for writ of error coram vobis, the California Supreme Court has declared:

> "[Appellant] does not have to demonstrate with certainty that a different result would obtain on retrial. Rather, [Appellant] must show facts indicating a sufficiently meritorious claim to entitle her to a fair adversary hearing. (Olivera v. Grace, supra 19 Cal.2d at p. 579; see also Bennett v. Hibernia Bank (1956) 47 Cal.2d 540 [305 P.2d 20].)" In re Marriage of Park (1980) 27 Cal. 3d 337, 346; 165 Cal. Rptr. 792; 612 P. 2d 882.

Petitioner-Plaintiff had been an employee of Advanced Micro Devices for almost five years, when as a direct consequence of being falsely accused of sexual harassment, he was forced to resign his position of employment. To a prospective employer, what are the explanatory choices available to someone who has been falsely accused of sexual harassment and subsequently forced

to resign his or her position of employment? What is the acceptable alternative to telling the truth?

The court in Elmore v. Shell Oil Co. (1988) 733 F.Supp. 544, 546, was able to reason to the correct legal conclusion:

> Plaintiff's ability to fabricate a story to prospective employers about the circumstances surrounding his discharge is simply not a viable alternative. See Lewis. Since plaintiff was in the employ of [his former employer] for a substantial period, he was compelled to repeat the alleged slander to explain his sudden departure. Accordingly, I find that plaintiff has stated a claim for defamation.

See also McKinney v. County of Santa Clara (1st Dist.1980) 110 Cal.App.3d 787, 796, 168 Cal.Rptr. 89, 93-94, which is declarative of California law and cited in Elmore.

The California Supreme Court itself has addressed the subject of false accusations of wrongdoing. In Mitchell v. Superior Court 37 Cal.3d 268, 283; 208 Cal.Rptr. 152, 690 P.2d 625 [Nov. 1984], the unanimous California Supreme Court stated: "There is very little public interest in protecting the source of false accusations of wrongdoing." And the Mitchell California Supreme Court also quoted from a United States Supreme Court opinion as follows: "Herbert v. Lando, (1979) 441 U.S. 153, 169 reminds us that the individual's interest in his reputation is also a basic concern"

Id. at 275. Petitioner-Plaintiff was unemployed in his chosen profession for four years as a result of false allegations of sexual harassment.

Plaintiff-Petitioner did not learn of the fraud upon the law and motion judge for the trial court until over a year after it occurred. Following four successive night class courses of paralegal training at the University of San Francisco, in which Petitioner-Plaintiff studied Civil Procedure Before Trial and Legal Research and Writing, Petitioner-Plaintiff solely prepared and properly served a Deposition Subpena upon his former employer. On the date of the scheduled Deposition, Petitioner-Plaintiff received a letter from an attorney with the law firm of Schachter, Kristoff, Orenstein & Berkowitz which reads in pertinent part as follows:

> "This firm represents Advanced Micro Devices. We are in receipt of a Deposition Subpena and Notice of Deposition in the above referenced action directed to Advanced Micro Devices, a non-party. We understand the above-referenced lawsuit has been dismissed by the court. . . . Consequently, the documents served on my client seeking information pursuant to that lawsuit are improper and have no force or effect. AMD will not be responding to the subpena or attending the deposition as noticed.

Petitioner-Plaintiff did not actually receive the letter until the end of the day. First, Petitioner-Plaintiff attended the scheduled, but otherwise unattended, deposition and read into the record several questions to the first two anticipated witnesses, the company lawyer that did the investigation into the false allegations and the Human Resources Vice President with whom Plaintiff-Petitioner had several communications. The court reporter transcribed questions were submitted as a separate exhibit to the Sixth District Court of Appeal. But for the fraud perpetrated by Attorney-Defendant upon the law and motion judge for the trial court and absent Petitioner-Plaintiff, the available information sought pursuant to the legal malpractice lawsuit would have been provided by Advanced Micro Devices at that time.

Petitioner-Plaintiff made arguments in vain to both the Sixth District Court of Appeal and the California Supreme Court that extrinsic fraud in a judicial proceeding by an Attorney-Defendant in a legal malpractice lawsuit should not be rewarded.

"On the issue of laches, if the evidence of the actual testimony from the several women interviewed by the employer regarding the sexual harassment allegations is now lost due to Attorney-Defendant's professional misconduct and the passage of time, the memories of the women interviewed shall have to be sufficient to uphold Plaintiff-Petitioner's claims of employer misconduct. Plaintiff-Petitioner will lose on the merits in this malpractice action if Plaintiff-Petitioner cannot show that he would have received

a favorable judgment in the underlying employment law case. Feldesman v. McGovern 44 Cal. App. 2d 566, 568.

In 1986, in order to avoid any and all liability for his legal malpractice in 1984, Attorney-Defendant fraudulently led his client Plaintiff-Petitioner to believe that the legal evaluation of the book manuscript had been done and Attorney-Defendant had concluded that none of Plaintiff-Petitioner's legal rights had been violated by anyone. This calculated fraud, this deception which prevented knowledge of Plaintiff's rights, was committed by Attorney-Defendant in order that Plaintiff-Petitioner would not seek out the opinion of competent legal counsel regarding the book manuscript and thereby discover Attorney-Defendant's legal malpractice for which Attorney-Defendant would be held financially liable by the courts. Attorney-Defendant fraudulently pretended to represent Plaintiff-Petitioner but in reality was conniving at Plaintiff-Petitioner's defeat.

"Honesty is one of the most fundamental rules of ethics for attorneys, and an attorney who intentionally deceives his client is culpable of an act of moral turpitude. Consequently, because the ends of attorney discipline are remedial and not punitive, an act of dishonesty toward a client warrants actual suspension or disbarment from the practice of law even if no harm results to the client." Gold v. State Bar (1989) 49 Cal. 3d 908, 914, 264 Cal. Rptr. 125, 782 P.2d 264. (emphasis added)

As a consequence of Attorney-Defendant's fraudulent concealment from Plaintiff-Petitioner in 1986 of

Plaintiff-Petitioner's causes of action against his former employer, all evidence then available as to the underlying case in this malpractice action was put at risk of being lost forever. Attorney-Defendant should be equitably estopped from pleading now before this court that the issue of laches should apply. For as Justice Blackstone has stated: "It is a rule that no man shall take advantage of his own wrong." (Blackstone's Commentaries on the Law, "The Rights of Persons" P. 182)" (Petition for Review P. 30 - 32)

CONCLUSION

All that Plaintiff-Petitioner has ever asked for is a hearing on the merits of the original legal malpractice complaint. Petitioner ended his Petition of Review to the California Supreme Court in the following manner (Petition for Review P. 32.):

> "A man, by natural right, has a right to judge in his own cause; and so far as the right of the mind is concerned, he never surrenders it. But what availeth it him to judge, if he has not the power to redress? He therefore deposits this right in the common stock of society, and takes the arm of society, of which he is a part, in preference and in addition to his own. Society *grants* him nothing. Every man is a proprietor in society, and draws on the capital as a matter of right." Thomas Paine, Rights of Man, (The Heritage Press, 1961) P.38.

For the reasons stated, this petition for review should be granted, and this cause should be set for argument."

Petitioner chooses to end this Petition for Justice to the United States Supreme Court with a favorite and important Lincoln story about justice owing to one falsely accused and the men and women in government controlling the power of justice.

> Senator J. F. Wilson, in pleading the cause of a soldier wrongfully accused of desertion, and finding the Secretary of War inexorable, "appealed to Caesar," and procured an overriding order from the President which Stanton finally obeyed. When the result was reported to Mr. Lincoln, he said:
>
> "Well, I am glad you stuck to it, and that it ended as it did; for I meant it should so end, though I had to give it personal attention. A private soldier has as much right to justice as a major-general." (as told by Sen. James F. Wilson in Hertz, Lincoln Talks, A Biography in Anecdote, (Blue Ribbon Books, 1941) P. 544.)

For the reasons stated, this petition for justice should be granted, and this cause should be set for argument.

Respectfully submitted,
By David Lockmiller
in Pro Per

RULE 11
PARTY SIGNING DECLARATION

I, David Lockmiller, Petitioner and Plaintiff, to the best of my knowledge, information, and belief, formed after reasonable inquiry, do swear that this petition is not presented for any improper purpose, such as harassment, is supported by the existing law, contains allegations that have evidentiary support, and contains denials of factual contentions that have evidentiary support.

David Lockmiller

David Lockmiller

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Superior Court
FILED
June 25, 1991
Robert Wandruff Clerk
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA CLARA

DAVID LOCKMILLER, Plaintiff, vs. DENNIS DEL PONTE, LAW OFFICES OF ZINGHEIM, VERNON & DEL PONTE, Defendants.	)	NO. 648604 ORDER DISMISSING PLAINTIFF'S ACTION

ORDER DISMISSING PLAINTIFF'S ACTION

The motion of Defendants, DENNIS DEL PONTE, and LAW OFFICES OF ZINGHEIM, VERNON & DEL PONTE, for an Order dismissing the above-entitled action, due to Plaintiff's failure to prosecute and bring this case to trial within three years after the action was commenced against Defendants, came on regularly for hearing on June

20, 1991 in Department 2 of the above-entitled Court, the Honorable Reed Ambler presiding.

Proof having been [sic] to the satisfaction of the Court, and good cause existing therefore,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss the above-entitled action due to Plaintiff's failure to prosecute, and bring the action to trial within three years after the action was commenced against Defendants, is granted, and the above-entitled action is hereby dismissed.

DATED: June 20, 1991

By: /s/ REED AMBLER
HONORABLE REED AMBLER
Judge of the Superior Court

FILED
Jan. 16, 1996
Court of Appeal
Sixth App. Dist.
Michael J. Yerly, Clerk

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

DAVID LOCKMILLER,
Petitioner,

No. H014796
Super. Crt.
No. 648604

vs.

THE SUPERIOR COURT
OF SANTA CLARA COUNTY,

Respondent.

DENNIS DEL PONTE, et al.,
Real Parties in Interest.
_____/

BY THE COURT:

The petition for writ of mandate is denied.

(Premo, Acting P.J., Elia, J., and Mihara, J., participated in this decision.)

Dated: Jan. 16, 1996 PREMO, Acting P.J.

SUPREME COURT
FILED
Mar. 20, 1996
Robert Wandruff Clerk
Deputy

Sixth Appellate District No. H014796
SO51466

IN THE SUPREME COURT OF CALIFORNIA

DAVID LOCKMILLER,
Petitioner,

v.

SUPERIOR COURT OF
SANTA CLARA COUNTY,

Respondent.

DENNIS DEL PONTE, et al.,
Real Parties in Interest.

Petition for review DENIED.

MOSK
Acting Chief Justice